III. As to estoppel. Neither do we think the petitioner estopped. She has done no act during or since coverture, that amounts to an estoppel. Her antenuptial covenant to accept this conveyance in lieu of dower cannot have the effect to release her dower. In the case of *Hastings* v. *Dickinson*, 7 Mass. 155, the court says: "This leads us to the second ground, viz., that the defendant's covenant ought to have the effect of a release of dower. But this effect cannot be admitted on any correct legal principle. It is true that a covenant never to prosecute an existing demand shall operate as a release to avoid circuity of action. But a release of a future demand not then in existence is void. Now in this case, the settlement being executed before marriage, the demand of dower had no existence, the same being inchoate." In the case of *Vance* v. *Vance*, 8 Shepley (Maine) 364, the court say: "There can be no estoppel by executory covenants not to claim a *right* which is first to accrue afterward. The covenants of the wife with the husband before marriage, that she will not claim dower in his estate can not operate by way of release, estoppel, or rebutter to bar her of her dower."

The judgment of the Superior Court is therefore affirmed.

SCOTT, Chief Judge, DAY, WHITMAN and WRIGHT, JJ., concurred.

Supreme Court of Missouri.

MICHAEL HANNON ET AL. *v.* THE COUNTY OF ST. LOUIS ET AL.

The rule that counties, being political sub-divisions of the state, are not liable for the laches or misconduct of their servants, has no application to a neglect of those obligations incurred by counties when special duties are assumed or imposed on them.

Thus, where the county of St. Louis made a contract for laying water-pipe to the county insane asylum, the work being done under the supervision of the county engineer, and while a trench was being dug in the grounds of the asylum, it caved in and killed one of the workmen, it was held that the duty in which the county was engaged, was not one imposed by general law upon all counties, but a self-imposed one; that *quoad hoc* the county was a private corporation, engaged in a private enterprise (more especially as the work was being done on its own property), and governed by the same rules as to its liability. In such case it is immaterial, whether the performance of the work is voluntarily assumed in the first instance, or is a special duty imposed by the legislature, and assented to by the county.

And municipal and *quasi* corporations are, under the above circumstances, subject to the same doctrine of liability.

ERROR to St. Louis Circuit Court.

The petition alleged that in September 1872, the county of St. Louis entered into a written contract with Henry Luken, whereby the latter agreed to lay a water pipe from the main pipe, at the intersection of Lafayette and Grand avenues, along certain streets to the grounds of the County Insane Asylum, thence through those grounds to a connection with the cistern of the asylum, in order to supply the same with water; that the work was to be done to the satisfaction of the county engineer; was to be superintended by him, and that such precautions should be taken in the progress of the work, and in shoring such trenches as might be dug, in order to prevent accidents to life and limb, as the engineer should direct; that the width of the trench for the reception of the pipe was to be two and a half feet, and to vary in depth with the grade of the street; that the sides of the trench were to be shored with plank and timber; that the county reserved to itself the superintending control over the work, and the right to discharge any workman the contractor might employ; that in December 1872, the contractor had, in pursuance of the work, and under the direction of the engineer, dug on the grounds of the County Insane Asylum, then owned by the county, a trench thirty feet in depth, and not exceeding two and a half feet at the bottom; that by reason of this and of not being properly shored, the trench was dangerous, and known to be so by both the engineer and the contractor; that the minor son of plaintiff, Patrick Hannon, was in the employ of the contractor, engaged in laying the pipe along the bottom of the ditch, and, while the engineer was present, superintending and directing the work, the sides of the trench, without any fault or negligence on the part of Patrick Hannon, in consequence of the wrongful act, neglect and default of the engineer and of the contractor, in failing to properly shore the sides thereof, caved in and suffocated the son of plaintiff, &c.

A demurrer to this petition, on the ground that the "county is a political sub-division of the state of Missouri, and not a body corporate, either private or municipal, liable for the *laches* or misconduct of its servants or employees," was sustained by the Circuit Court.

Bakewell & Farish, for plaintiffs in error.—The case at bar is one in which the county was acting in a private capacity and was

liable to the extent to which a private corporation would be: *Lloyd* v. *Mayor of New York*, 5 Seld. (N. Y.) 369; *Eastman* v. *Meredith*, 36 N. H. 292; *Bayley* v. *Mayor of New York*, 3 Hill 539; *Mears* v. *Com. of Wilmington*, 9 Ired. 73; *Inhabitants Fourth School District of Rumford* v. *Wood*, 13 Mass. 198; *Thayer* v. *Boston*, 19 Pick. 511; *Akron* v. *M. County*, 18 Ohio 229; *Rhodes* v. *Cleveland*, 10 Id. 159; *Cunliffe* v. *Mayor of Albany*, 2 Barb. 190; *Larkin* v. *County of Saginaw*, 11 Mich. 91; Kent's Com., vol. 2, p. 375; *United States Bank* v. *Planters' Bank*, 9 Wheat. 907; *Conrad* v. *Village of Ithaca*, 16 N. Y. 172; *Hickok* v. *Plattsburg*, 16 Id. 161. In this case it is to be borne in mind that the party injured was working under the immediate direction and superintendence of a county officer: Dillon Mun. Corp., § 792, and cases cited.

Thomas C. Reynolds, County Attorney, for defendants in error, relied on *Reardon* v. *St. Louis County*, 36 Mo. 555; and referred to Dillon Mun. Corp., 2d ed. 1873, p. 872.

The opinion of the court was delivered by

SHERWOOD, J.—The case, as made by the pleadings, concedes the validity of the contract mentioned in the petition, and consequently that point is not open to discussion.

In the view we have taken of this case, it would be foreign, alike to our purposes and the facts admitted by the demurrer, to question the correctness of the proposition so generally concurred in elsewhere, asserted in *Reardon* v. *St. Louis County*, 36 Mo. 555, "that *quasi* corporations, created by the legislature for the purposes of public policy, are not responsible for the neglect of duties enjoined on them, unless the action is given by the statute." But as Mr. Justice METCALF, in *Bigelow* v. *Randolph*, 14 Gray 541, when speaking of the rule established in *Mower* v. *Leicester*, 9 Mass. 247, that a private action cannot be maintained against a *quasi* corporation for neglect of corporate duty, unless the action be given by the statute, very appropriately remarks: "This rule of law, however, is of limited application. It is applied in the cases of towns only, to the neglect or omission of a town to perform those duties which are imposed on all towns without their corporate assent, and not to the neglect of those obligations which a town incurs when a special duty is imposed on it with its consent,

express or implied, or a special authority is conferred on it at its request. In the latter case a town is subject to the same liabilities for the neglect of those special duties to which private corporations would be if the same duties were imposed, or the same authority conferred on them, including their liability for the wrongful neglect, as well as the wrongful acts, of their officers and agents."

Towns in New England, as mentioned in the above extract, occupy the same place as counties, for, in *Eastman* v. *Meredith*, 36 N. H. 292, PERLEY, C.J., when referring to the former, says: "Towns are involuntary territorial and political divisions of the state, like counties established for purposes of government and municipal regulation." A similar definition is given of counties. Dillon Mun. Corp., vol. 1, § 10 a.

In the case at bar, the county of St. Louis was not engaged in the discharge of duties imposed alike by general law on all counties; duties whose performance, if neglected, might have been enforced by appropriate precedure for that purpose; but in the discharge of a self-imposed duty not enjoined by any law. And the test of the matter is this: that the county could not have been compelled to enter on the work for whose performance it contracted.

If the doctrine asserted in *Bigelow* v. *Randolph*, *supra*, be the correct one, and it has received the approval of Mr. Justice DILLON, in his work on Corporations (vol. 2, § 762); and if, as before stated, the county undertook the contract of its own volition, and not in the observance of a public duty imposed by general law, then there is no refuge from this result: that the county, in regard to the performance of that contract, must occupy the same attitude as if a mere private corporation, and the work thus contracted for should be deemed a private enterprise, undertaken for its own local benefit; and this is more especially the case as the work, at the time of the occurrence which resulted in this action, was being done on its own property. And it certainly can make no difference, in point of principle, whether the "special duty is imposed with its consent, express or implied," or whether, as in the present case, it voluntarily assumed the performance of that which, if imposed by the legislature, and assented to by the county, would have become a special duty. For it is the element of *consent* which attaches civil liability, with its attendant consequences, to

the act done. In other words, as certain results flow from the acceptance by a *quasi* corporation of a special duty or a special authority, it is therefore the exercise alone of that volition which fixes its liability. Consequently, it must become quite immaterial whether the thing done, from which civil liability ensues, originates in the free act of the county in the first place, or whether it is legislative permission and its subsequent acceptance by the county, which gives origin to the act whose negligent performance produces the injury complained of.

Bailey v. *The Mayor, &c., of the City of New York*, 3 Hill 531, was a suit brought to recover damages against the city for an injury to plaintiff's land in Westchester county, occasioned by the breaking away of a dam across Croton river, which dam, as well as the lands on which it was situated, was owned by the city.

It was alleged that the dam, which had been erected by certain water commissioners appointed by the state, for the purpose of introducing pure water into the city, was unskilfully built. The plan for the work had been, under the Act of the Legislature, submitted to the voters for their approval or rejection. It was approved; and the enterprise, which included the building of the dam, was then in pursuance of the act, under the direction of the common council, prosecuted by the legislative commissioners at the expense of the city. The city was held liable; and these were the grounds on which Chief Justice NELSON, in a very able and exhaustive opinion, in which many authorities were cited and discussed, held the liability to be based: 1. That the legislative grant was for the purpose of private advantage and emolument, though the public might derive a common benefit therefrom; the corporation *quoad hoc* was to be regarded as a private company. 2. "By accepting the charter, the defendants thereby adopted the commissioners as their own agents to carry on the work; the acceptance was entirely voluntary, for the state could not enforce the grant upon the defendants against their will." 3. A municipal corporation, in its private character as the owner of land and houses, is to be regarded in the same light as an individual, and dealt with accordingly.

The case finally went to the court for the correction of errors, where the judgment was affirmed: 2 Den. 433. There was some diversity of opinion in that court, as to the ground on which the affirmance should be placed, nineteen members of that court voting

therefor, against four for reversal; but only five of the number gave expression to their views in writing. The president of the senate gave an opinion for reversal. It may be very reasonably supposed, however, that those voting for affirmance did so on the same grounds as those stated in the opinion delivered. Senators Barlow and Bockie were for affirmance on the second ground stated by the Chief Justice, that the defendants had made the water commissioners their agents by adoption, but they did not question the correctness of the other grounds relied on by the Supreme Court, and in this view Senator Hand also concurred, as well as in the other views taken by the Chief Justice. Chancellor WALWORTH based his vote for affirmance on the third ground given by the Chief Justice, though a careful perusal of his opinion will clearly show a substantial accord between his views and those of the Supreme Court, except as to the question of agency resulting from adoption. The opinion in that case, having been so thoroughly discussed and considered in two courts possessing appellate jurisdiction, is valuable as a precedent, and, notwithstanding subsequent criticism (*Darlington* v. *Mayor, &c., of New York*, 4 Tiff. 164), has never been overruled: *Lloyd* v. *Mayor, &c., of New York*, 1 Seld. 369.

I am fully aware of the distinction so generally taken by the authorities between the liability of municipal corporations on the one hand, and the non-liability of *quasi* corporations under like circumstances on the other, though it has been very shrewdly observed in this connection, that "the courts have been much perplexed respecting the principle on which to rest the distinction:" Dill. Mun. Corp., § 764. But I think it may with safety be asserted, that the admitted facts of this case disclose no sound reason why any such distinction should be taken here, nor why the county, in respect to its own property, should not be held amenable to the same rules, as would certainly prevail were a municipal or private corporation, or an individual, a party defendant. Such is evidently the drift of the above cited cases, and such must be the evident and inevitable result, if that reasoning be pushed to its natural and logical conclusion.

Again, the legislature, by the Act approved February 8th 1870, recognised the County Lunatic Asylum as an existing fact, and provided that the county court might commit the insane of that county to the county institution: Laws App. to St. Louis Co., p.

202. The legislature also, by an act approved April 1st 1872 (Id. 203), before the contract or work mentioned in the petition was made or entered upon, recited the fact that the asylum was built at the expense of the county, and appropriated $15,000 annually in support of "the humane objects contemplated by its establishment," thus giving the whole matter legislative sanction and recognition. So that if it be urged that the argument is unsound which maintains that a self-imposed duty is tantamount to a special duty imposed, or a special authority conferred by legislative act, the ready reply is, that the acts of the legislature referred to bring the case fully within the principle applied by Mr. Justice METCALF, in *Bigelow* v. *Randolph*, *supra*.

This case is one of first impression in this state, and perhaps elsewhere; and if it goes beyond adjudicated cases, it certainly does not go beyond the principles which those cases enunciate.

Holding these views, the judgment should be reversed and the cause remanded.

Supreme Court of Wisconsin.

IN RE MOSNESS.

Attorneys should be residents of the state in which they are licensed to practise. They are officers of the court and the nature of their office implies that they shall be residents and subject to the jurisdiction of the state and the court.

It is an insuperable objection to the general admission of any person to the bar that he is a non-resident; but as a matter of courtesy it is customary to permit non-resident lawyers to appear and conduct cases *pro hac vice* only.

MOTION for the admission to the bar of this court of Ole Mosness, a member of the bar of the state of Illinois.

The opinion of the court was delivered by

RYAN, C. J.—It is, we believe, the general practice of courts of record in the several states to permit gentlemen of the bar in other states to appear as counsel, on the trial or argument of causes. Such has been the uniform practice of this court. And, under all ordinary circumstances, it will always be a pleasure to us to permit members of the bar of other states to argue causes here, whenever they may appear here to do so. No license to practise here is necessary or proper for that purpose; the usual and proper practice being to grant leave, *ex gratia*, for the occasion.